SUPREME COURT, U. S.

FILED

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MICHAEL RODAK, JR., CLE

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 73-1559

FAIRVIEW NURSING HOME,

Petitioner

VS.

NATIONAL LABOR RELATIONS BOARD,

Respondent

PETITION FOR RE-HEARING

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Petitioner

VS.

NATIONAL LABOR RELATIONS BOARD,

Respondent

PETITION FOR RE-HEARING

Comes the Petitioner Esther J. Johnston, by and thru her Attorney, and respectfully requests a Re-Hearing on her Petition for Certiorari and submits herewith the following grounds and excerpts from the Record together with the authorities thereto pertaining.

1. The National Labor Relations Act as amended (61 Stat. 136. 73 Stat. 519, 29 U.S. Code Sec. 151 et seq.) does not authorize the Actions and Decisions of the Board and the U.S. Court of Appeals for the fifth Circuit in the Case at Bar. (Ref. N. L. R. B. V. Burns International Security Services, Inc. et al Burns International Security Services Inc. et al V. N. L. R. B. 406. U.S. 272, 92 Sup. Ct. 1571, 404. U.S. 822, 92 Sup. Ct. 559.)

What is not provided by the law cannot be supplied by fabrication. Your Petitioner does not seek the slaughter of any of the N. L. R. B.'s Sacred Cows, but prays that this Honorable Court will look Closely into the eyes of this animal to see that it isn't real. The Reviewer of the record will observe the reflections there of the substitution of fiction for fact, and Board theory for the Law. Clearly, it is all done with Mirror's.

U. S. C. 29 §§ 160

No order of the Board shall require the Reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

U. S. C. 29 §§ 157 (Note 114)

A total strike is a concerted activity protected against employer interference, but deliberate slow-downs and walkouts by employees to exert pressure on employer to accept Union's bargaining demands are unprotected concerted activities, and employer is free to discharge participating employees for their unlawful disloyal tactics. N. L. R. B. Vs. Blodes Mfg. Corp. C. A. Ark. 1965 344 F. 2nd 998.

CROSS - EXAMINATION OF WITNESS CLARA BARNETT (R-415) APP 215 - 216.

Q Is it not a fact that you have testified here that you said, I signed a union card. Am I fired?

A That's what I told you.

Q Is it not a fact that I said, no, go back to work?

A You did.

MR. ROBINSON:

That's all. Thank you.

MR. COHEN:

Nothing further, Your Honor.

JUDGE:

You are excused.

(Witness excused.)

Mr. Cohen, what's your theory with respect to why I should find that this witness was discharged?

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MR. COHEN:

I don't think — I know of at the moment at least one

more, maybe several more in the same classification who were neither there on the morning of March 11th when Mrs. Johnston made the alleged remarks or Mr. Robinson made the alleged remarks. It's the theory or the General Counsel's position that throughout this period there was a constant violation of Section 8(a) (1) which included threats to discharge them for signing cards and working on behalf of the Union throughout this entire period of January, throughout February and March.

This individual was threatened as well as all the other witnesses in the same classification. It's the General Counsel's position that when these witnesses were informed by other employees of the events and could see for themselves in this case, the other employees down at the end of the line who were obviously not working; that they had in view of the 8(1) and in view of what these employees told them reasonable cause to believe that they had been fired and it would be futile for them to go up there and say I'm here, to say I'm fired.

While these women are not particularly well educated they are having to face an attorney who is the administrator of the home. And they had every reason to believe that going up there would cause a hassle. These girls had all

signed union cards prior to the events of March 11th. They were threatened, they were told, they had been threatened by discharge. They had reason to believe that to go up there would have been futile. They had signed union cards and been informed that Mrs. Johnston had fired everyone who had signed a union card. The belief is for the inference that they would draw, I signed a union card, therefore I'm fired. It would be futile for me to go up there and deal with Mrs. Johnston in view of what had been told them.

We will also present a witness who was not scheduled to work on March 11th. The first time he comes in and meets with any official of the home he is given two checks, his regular pay check and a check up through the last date he worked. This further supports the theory that these individuals were discharged. Here is a man not scheduled to

work on March 11th. The first time he goes up the hill and says nothing to management he's handed two checks that paid him off in full.

Combining this with what the other employees have told him and the circumstances generally as well as the overall 8(1) that's the General Counsel's position.

JUDGE:

Are you claiming that because the Employer informed certain employees that they were discharging union card

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signers that it made those employees his agent to inform other union card signers that they were discharged?

MR. COHEN:

I don't think it's an agency question. I hadn't thought through this question. My initial gut reaction would be that it's not in effect an agency. I would hate to have to argue agent. I think the effect is the same in view of the surrounding circumstances, in view of the other 8(1), especially in view of the other threats to discharge.

MR. ROBINSON:

Let me respond.

JUDGE:

One second.

MR. COHEN:

Basically, in effect, they in effect became agents. I wouldn't want to rely and make it an agency argument as such. It's the entire circumstances surrounding that. They had reasons to believe that their actions in returning to work would be futile in view of what they were told, in view of the constant threats, the threats at the staff meetings, the individual threats, that they had signed union cards. They were told that Mrs. Johnston had fired everybody. And yet, then they are told later or

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they are also told that when Mr. Johnston sees them, he also says and reaffirms that they were fired by saying, as the testimony has already shown, he says, you might as well take

the checks. You've been fired anyway. This reaffirms again. I think it's an unreasonable burden in this kind of circumstance.

I'm strictly, at the case in point for an employee, a nurse's aide, an orderly, a laundry maid, a cook to have to force them in effect to deal with an attorney, an administrator on unequal footing. They had all reason to believe that they were, in fact, fired.

JUDGE:

Assuming that they were not, in fact, fired and that would be the finding in this case would it then be incumbent to consider that they are unfair labor practice strikers?

MR. COHEN:

I think so. If you reject the position of the General Counsel which basically the argument is constructed discharge of these individuals; in this circumstance, well, you can't leave them in a position of limbo. They would have to at that point become unfair labor practice strikers who would not return to work in view of what took place that morning. It was a direct discharge of employees for

engaging in union activities.

JUDGE:

I think it that you are convinced that your prima facie case would establish in respect to this witness that she by her actions on the 10th of March, she did not quit or resign.

MR. COHEN:

No. The 11th of March. She considered herself when informed by fellow employees of management's actions in view of the threat directly made to her, the staff meetings where these threats were made, and in view of the fact that she signed a union card, she considered herself fired.

JUDGE:

Would you say that the Respondent by the fact that she had not appeared for work could rely upon the proposition that she had voluntarily quit?

MR. COHEN:

I think no in these circumstances. If the General Counsel's witnesses concerning the morning of March 11th are accredited. Obviously if they are not accredited the case crumbles.

JUDGE:

I have no alternative in a prima face case.

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MR. COHEN:

The employees who did not appear that day were not scheduled to appear that day and who did not show up on the first scheduled shift. I think it's incumbent upon them in these circumstances for the Respondent to notify the employees, you must return to work. It would have been no great hassle. We've already seen testimony that Mrs. Johnston at various times called employees at their home and said, can you come in on your off day. Can you come in at a different time.

I think in these circumstances it would have been incumbent upon Respondent in view of what took place on the morning of March 11th and in the afternoon of March 11th to get in contact with these employees and to tell them to be at work by such and such for a regular shift or be discharged or to face possible discharge; if he's claiming that they were. I don't know what the position is. They quit or have failed to come back. It's incumbent--

JUDGE:

You claim the duty was on the Respondent to act, to request the employees to come back.

MR. COHEN:

I think so. Where the employees have every expectation that any further action on their part is futile.

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The responsibility then shifts and these very limited

circumstances –

JUDGE:

Do you have any evidence which will support an offer of the employees who you alleged have been discharged having offered to go back to work?

MR. COHEN:

I know of no offer by employees or of any action by Respondent concerning their return to work. I believe things ceased as of 3:30 or whatever on March 11th as far as we are concerned.

JUDGE:

Mr. Robinson, I'll hear you now.

MR. ROBINSON:

I have particularly –

JUDGE:

You understand, Mr. Robinson, that at this point in the case I am required to view the General Counsel's case from the best flight in his favor. Well, I might find that he does not have enough evidence to establish what he claims by propounderance of the evidence anyway. I will hear you at this point.

MR. ROBINSON:

Thank you. We followed the unique theory present by the Government's Counsel and noted particularly that he does identify it as a theory. That he has stated that the

employees knew that every act on their part is futile. The only act that was ever asked of these employees, the evidence will demonstrate, just to work eight hours for eight hours pay, nothing else. He cites about worrying about an unreasonable burden put on the witnesses. It's obvious he's also worried about unreasonable burden put on the General Counsel of proving his case. He's been unable to do this so far.

He also would like the Court to accept a constructive discharge that anyone could tell anyone else that they are discharged when the facts will show that we were presented

with a nursing home with 150 sick and aged patients and 150 endangered of starvation and death. We were happy to have anyone and everyone to work. It shows even voluntarily by these good ladies who have testified, they were asked to go on to work; even the last lady said, her comment although questionable and subject to credibility tests, well, she did say that even in this testimony of me saying I signed a union card, am I fired. She was told, no, go back to work.

The ladies who have testified earlier, Mrs. Kenerly and Mrs. Lanier, yesterday, before the rehearsal in the interim period by parties and parties unknown came back with a slightly modified story. The first lady said, affirmatively

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they were told to go on back to work by me the administrator who means business and can carry out his instructions to go on and go back to work.

Affirmatively the next lady said, she said, go on, go on, go back to work. But he was smiling. I don't know whether he meant it or not. I don't smile very much but I try occasionally. The testimony diminishes from then. Then he comes up this morning with witnesses. They've got to tell the truth. They are under oath. But they are colored a little bit. They'll say, yes, he came down and gave us our checks and he said, but you are all fired. That insults the intelligence of any administrator yet alone any lawyer.

The simplicity of the matters was that I had 40 believed to be friends down there in the hot sun. When I walked down to carry their checks, hoping that some of them would come back up the hill and work for me. The evidence will show that one of them did. The evidence will show that he has since been threatened, cursed, beaten but nevertheless he did come back and work.

The evidence will show that the parties, they have been previously identified for misconduct, will not be eligible for reinstatement. The evidence will show that the parties who were first on the picket line were not included in the Complaint because the General Counsel's own investigation determined that they were not a subject of

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or a recipient of any misconduct or unfair labor practice.

The General Counsel's own admission, one out of seven of his original Charging Parties remain in the Complaint. The other seven have faded away. None of them are present because they didn't have a case of law in fact or in truth. It's an attempt to fabricate constructive theory and constructive discharges. They've told me I've been fired a couple of times in my life but never constructively. It was always the boss saying you're fired. In this case he would have the Court believe that you can spread by word of mouth, telephone or conversation to numerous parties that, no need going to work, you're fired. Any thinking person that wasn't afraid of the collective act of others would say, my job is important to me. I will find out from the boss.

Those persons are automatically excluded from being entitled any consideration as far as the failure to work and as far as any unfair labor practice charge by the Employer goes.

Secondly, the Government's Counsel has stated that as far as he is concerned the whole thing is over with at 3:30 on March 11th. Mr. Cohen was so young and naive, he would realize the whole thing just started at 3:30 on March 11th. That's when the hardships and burdens were

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brought upon my client. That's when the patients suffered. And these people failed and refused to work. And any and every one that did come back to work were given their jobs back.

The charge says they were unlawfully fired for union activities which the evidence will show is falsely charged against my client. The second line of the same charge says and they refuse to reinstate them. The testimony to be offered will give light to that. They were offered reinstatement along the line each and everytime they were to communicate with the Employer.

So, the truth of the matter is that the majority of these present were mislead, misinformed and misguided and are now being encouraged to mistestify.

MR. COHEN:

I won't defend my naivete, my being naive.

JUDGE:

Excuse me. I didn't hear what you said.

MR. COHEN:

But I do take great exception to being accused of fabricating facts, of in effect perjury.

JUDGE:

He was referring to your witnesses and not to you, I'm sure. He wasn't referring to you personally.

2. The N. L. R. B. has unlawfully applied it's successorship Doctrine to the Case at Bar, including this Petitioner and her successors or assigns in the Board's Order for Reinstatement and back pay, contrary to current decisions of this Court, and in conflict with the Board's Administrative Trial Judges' Commitment to Counsel for all parties in the Record.

"The application of the Successorship Doctrine is not authorized by the Labor Management Relations Act."

"I am unwilling to follow the Board down the Successorship road since I believe to do so would substantially undercut the principle of free choice of Bargaining Representatives by the Board." N. L. R. B. V. Burns International Security Serivces, Inc. et al Burns International Security Services Inc. et al V. N. L. R. B. 406. U.S. 272, 92 Sup. Ct. 1571 404. U.S. 822, 92 Sup. Ct. 559.

(R. 829 APP. 547)

MR. COHEN:

The only thing General Counsel would like to add, after – at the chamber of discussion, that we feel that the new tenants in any decision rendered by your Honor should be at least served if not officially served as a party, at least sent a copy of the decision as an interested individual.

JUDGE:

The way the matter stands, they are not a party to this proceeding. And they will not be served with a copy.

MR. COHEN:

Fine, fine.

MR. ROBINSON:

As a courtesy to counsel . . .

JUDGE:

The matter which Mr. Longshore raises if the parties all agree that that shall be deferred to a compliance proceeding I will issue only the usual order and you can litigate whether or not the back pay should be cut off or whether reinstatement should be required at that time.

MR. LONGSHORE:

That's my position.

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JUDGE:

Is that agreeable to you, Mr. Robinson? Is it?

MR. ROBINSON:

We feel we are not in a position to make the Trial Judge's decision. We disclosed all information we have at this hearing. We do have one other thing. If I may proceed a moment, –

MR. COHEN:

Are we finished with this issue? That's always been General Counsel's position. That this is strictly a compliance matter. And apparently, it's Mr. Longshore's opinion and I gather it's probably Mr. –

JUDGE:

If there's no objection I will indicate that the matter in respect to reinstatement and the termination, the determination of the liability for back pay will be referred to the compliance hearing, if there needs to be one.

MR. COHEN:

In view of this I will renew my motion in opposition of the papers in the record. They should be placed in the rejected file.

JUDGE:

I think they are pertinent to this proceeding.

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MR. COHEN:

Okay.

JUDGE:

Even though I should defer the matter to compliance I still think the exhibits are pertinent to this proceeding.

MR. COHEN:

Okay

JUDGE:

Anything further?

MR. ROBINSON:

Yes. Counsel –

JUDGE:

Just one second.

Do you understand, Mr. Cohen, that the decision of mine would not be binding upon any party that's not a party to these proceedings unless it should appear that that party is an alter ego of the Respondent?

3. The Board has failed to Comply with the Rules of Civil Procedure as required by the National Labor Relations Act, as Amended.

U. S. C. 29 § 160

"Any such Proceeding shall, so far as practicle, be conducted in accordance with the rules of Evidence applicable in the District Courts of the United States under the Rules of Civil Procedure for the District Courts of the United States. Adopted by the Supreme Court of the United States pursuant to Section 2072 of title 28."

Infringement of Petitioner's right of Counsel by Board's denial of Petitioner's Motion to Separate Witnesses thereby substantially destroying opportunities for Cross-examination of Board's Witnesses by Petitioner's Counsel in violation of Petitioner's Constitutional right of Equal Protection under the Law and the Due Process Clause of the Fourteenth Amendment.

Ever since the prophet Daniel exposed perjury in the prosecution of Susanna by examining each of the witnesses in the absence of the other, it has been the practice of the Courts, on the request of either Counsel, and sometimes on the Courts's own Motion to bar from the Courtroom all witnesses in the case except the witness on the stand. The reason for this practice of course is that one prospective witness should not be influenced by the testimony of another (as made in the instant case). The request for an Order of Separation of Witnesses should be made before any testimony is offered on the trial and the separation of witnesses should continue until the testimony is closed. Even after a witness has testified, he is still bound by the Order, since he may be re-called. The consequences of disobedience to such an Order are possible disqualification from testifying. (Wigmore on Evidence s 1837-42)

4. U. S. C. 29 § 160 (e)

If either party shall apply to the Court for leave to Adduce Additional Evidence, and shall show to the Satisfaction of the Court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the Hearing before the Board, its Member Agent or Agency, the Court may Order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the Record.

The N. L. R. B. and the Fifth Circuit Court of Appeals has abused its discretion by suppressing from the Record material Evidence offered by Union members, and the police officer on the scene, in support of the Petitioner's position, offered together with reasonable grounds for the failure to Adduce such Evidence before the Board, and presented in the Employer's Motions to Adduce Additional Evidence and Motion to Remand which Motions were denied.

Upon the Court of Appeals subsequent granting of the Petitioner's Motion to Supplement the Record en banc, the Board was lawfully obligated to surrender for the Record "2. the Sworn Affidavits of the employees taken by the Board in the investigation of the Charges, requested by Employer's Attorney during the Hearing, refused by the Board, and

admitting that these several employees, who were discharged, were discharged for good and valid reasons. (R 477-479)

To this day the Board withholds these Affidavits from the Record, and Petitioner submits there can be no lawful review of the Record, when the Record is imcomplete, and presents only the hearsay and conclusions selected by the Board to weave its web of constructive discharges of all Union Card signers, while ignoring or suppressing all documented proof of a voluntary strike or walkout of the former employees of Fairview Nursing Home.

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JUDGE:

Correct me if I'm wrong now. Mr. Robinson claims that the employees were not discharged on March 11th but that they came up with the anticipation of being strikers. And I take it what he is attempting to show now is that there were certain grievances which prompted the employees to act in this manner. And one of the grievances was to discharge a couple of employees for cause. And that is what this background of discharges – it's more reasonable to conclude that the employees got to the point where they decided we are going to take the company on and marched in on the 11th of March and decided they were going to strike. That's what I thought.

MR. COHEN:

All I'm objecting to is – I will stipulate with Counsel the names of these six individuals and the date they were discharged. But it is irrelevant as to going in to why they were discharged. I will stipulate that they were discharged and that Respondent contends that they were discharged for good cause.

JUDGE:

I think the reason for the discharges might have been one cause of the employees desiring to put on the

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pressure by way of strike. If they were discharged for no reason at all it would be a greater incentive perhaps, to strike than if they were fired for cause. If you want to stipulate to the fact they were discharged and the reason for their discharge I will permit that.

MR. COHEN:

If Respondent, as the witness has just testified I think there were six. I think she discharged four and Mr. Robinson two. Maybe it was the other way around. This witness presumably is going to testify as to her direct knowledge on the individuals that she discharged. She'll give evidence – I don't know what evidence on the ones she didn't discharge. Mr. Robinson isn't going to be a witness and I'm going to be precluded. It will be selective testimony.

JUDGE:

Are you willing to stipulate that the Regional Office made an investigation of these six people and concluded that they were not discharged for discriminatory reasons? I think that would satisfy you, would it not, Mr. Robinson?

MR. ROBINSON:

If he submits therewith the affidavits of the investigation, the sworn affidavits.

MR. COHEN:

Of course, there's no way in the world I'm going to do that.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FAIRVIEW NURSING HOME,
PETITIONER,

VS:

NO. 73-1919

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

MOTION TO REMAND

Comes the Petitioner in the above styled cause and moves, that this Case be Remanded to the National Labor Relations Board to Adduce Additional Evidence set forth herein, together with all other relevant testimony and exibits presented at said hearing, and for grounds for said Motion, herewith represents and shows unto your Honors that: **There is perjury in the Record.** That to affirm the decision of the Board would reward said perjury and do great harm to the Petitioner. That to Remand the Case to the Board to Adduce The Additional Evidence herewith presented would expose the perjury in the Record and reveal the Truth of the Matter in Controversy, and require a different result from the Board's finding in the Case at Bar.

1. That one of the primary issues in the instant Case is "Whether the alleged Union Leader, Ola Veneziano, and others were discharged for Union Activities by the Employer," whereas, **the testimony of Sarah King, her co-worker and fellow member of the Public Employees Organizing Committee was not available to the Employer at the Hearing before the Administrative Trial Judge** for the reason cited in her attached Affidavit No. 1, and which eye-witness Testimony will refute the hearsay evidence credited by the Administrative Trial Judge.

2. That another issue of the Instant Case is "whether the employees received a valid offer of reinstatement by the Employer's Administrator, Robinson, at the time of the 3 P.M. payday on the first day of the dispute in question?" Whereas, **the Testimony of a Police Officer who was present and witnessed the events in question was not available to the Employer at the Hearing before the Administrative Trial Judge** for the reason that his identity was unknown to the Employer's Attorney at the time of the Hearing, and in a metropolitan area of approximately a million people with several hundred police officers, it has required several weeks of research and numerous inquiries to identify and locate the police officer, whose Testimony is set forth in Affidavit No. 2 attached, and which Testimony is absolutely essential to the Record of the Case at Bar, and will prove the Employees were offered reinstatement, if they were fired, which they were not.

3. That a key witness in the Board's Case against the Employer, whose Testimony was credited by the Administrative Trial Judge, has voluntarily come forth and has requested that he be given an opportunity to change his Testimony as set forth in his Affidavit No. 3 attached.

4. Justice requires that these witnesses and all others so willing to testify be heard to expose the perjury in the Record.

5. One of the primary issues in the Case at Bar is "whether or not the Employer engaged in Unfair Labor Practices, and unlawfully discharged numerous employees. Whereas in truth, the former employees were engaged in a voluntary strike to force the re-hiring of six former employees that had been terminated for good cause during January and February prior to the called strike on March 11, 1972 (R. 479-487) and (Res. Exibit No. 4 and G.C. Exibit No. 9). **Unavailable and unknown to the Employer's Counsel at the time of the Hearing before the Administrative Trial Judge were "Hand-bills" printed and circulated by the strikers and dated March 11, 1972 and which verify that the employees reporting to work were informed by their own leaders "that they were fired," and not by the Owner,** Further the handbill refers to the "fired six workers in February", that the Board had ruled to be, in effect, lawful terminations (Ref. Respondent's Exibit No. 4) and declares that, "The Fairview employees are ready and willing to go back to work when they are **ALL** called back. (Ref. Attachment C.)

To allege that this handbill is a strike Notice and belongs in the Record is the greatest understatement since Noah said, "it looks like rain"!

6. Because it interfers with the proper Administration of Justice, the National Labor Relations Board should not suppress evidence that it has a legal obligation to reveal, specifically the sworn Affidavits of its witnesses during the investigation of Unfair Labor Charges, and their Judicial Admissions in the prior Representation Case involving the same parties, particularly when said witnesses gave contrary Testimony on the different occasions. (Ref. Aff. No. 4 and Attach. D.)

That said Judicial Admissions "that the Fairview employees were on strike" were signed and sworn to by the representatives of the strikers and attached to and made a part of the pleadings in said Representation Case, and removed from the Brief of the Employer to the Administrative Trial Judge in the present Unfair Labor Case by the Board. (Ref. Attachments No. 5 and No. 6.) That said Affidavits of the employees were taken by the Board in the investigation of the charges of Unfair Labor Charges, requested by employer's Attorney during the Hearing before the Administrative Trial Judge and refused by the Board. (R. 477-479.)

S. Patrick Robinson
Attorney for Petitioner

STATE OF ALABAMA)
)
JEFFERSON COUNTY)

AFFIDAVIT

My name is Sarah King, I am employed at Fairview Nursing Home, where I worked on the same floor and same shift as Ola Veneziano. I had promised to and intended to testify at the Hearing of the Fairview Case before the National Labor Relations Board, but I did not show up because my elderly mother had a hemorrhage, and I spent that day with her without notifying Mr. Robinson.

On the night that Mr. Robinson fired Ola Veneziano, Ola had been raising hell all night, including talking loud, cursing about the work and bosses and being terribly loud in the presence of patients and other employees for most of the shift, even though another employee from the next floor and I both asked her to please be quiet. Finally Ola propped herself up in a chair and went to sleep for about two hours during the last part of our shift.

In the early morning Mr. Robinson came in and questioned Ola, me and the Nurse about the disturbance and then fired Ola.

Although I signed one of their P. E. O. C. cards, I told Ola Veneziano, Hazel Porter and Robert Edwards that I would not strike on sick old people in the Nursing Home like they were machines or a factory, and I worked all through the strike, and I'm still working there, and I never authorized anybody to use my name to file charges against Fairview.

_____
Sarah King

Sworn to before me this 18th day of July, 1973.

_____
Notary Public
State at Large

AFFADAVIT .

My name is Willie Posey, and I want to change my Testimony in the Fairview Case.

When I arrived at Fairview Nursing Home, I was late for work, and about twenty or thirty people were in the lobby talking, and I went past them to the bathroom to change to work clothes, and returned to the lobby, and when I came back to the lobby the other employees were going out the door, and they told me to "come on, I was going right with them, and some of them said go back and get Zellie out of the kitchen and they went in the kitchen and came back with Zellie and they all went outside - about that time the Police came - the Police said it was best for them to go on off the property, and some of the employees asked them if they would come back at 3 o'clock and go up with them to get their pay checks, and the Police promised they would do that. When Mr. Robinson came down about 11 o'clock that morning with our pay checks, they refused them, all but Zellie and said they would come up at three o'clock for them when the Police came. They walked away from Mr. Robinson, and some of the employees yelled out "don't take the checks, we will get them at three o'clock when the Police come." Mr. Robinson just turned around and went back up the hill.

At three o'clock we went back up the hill with the Police, and Mr. Robinson was handing out the checks, and more than thirty of the employees said they wanted their time, they wanted the rest of their pay, and Mr. Robinson said if they would wait a few minutes, he would go back in and see the records and make out their other checks. Mr. Robinson asked the 3 to 11 shift if they was going to go on to work, and they just stood there and didn't answer. Later, Mr. Robinson came out with the rest of the checks and we took them and went back down to the foot of the hill.

I have never heard any of the employees mention a union or union card to Mrs. Johnston, and I have never heard her mention a union or union card to the employees. In fact we were all told not to mention the card or the union to Mrs. Johnston.

Willie Posey

Given under my hand and seal this 16th day of August, 1973.

Notary Public

STATE OF ALABAMA)
)
JEFFERSON COUNTY)

AFFIDAVIT

My name is Margaret Barnett. I was employed at Fairview Nursing Home during March of 1972, and when the union people came around to get the union cards signed, we were threatened and told "if we didn't sign the cards we would get our tails whipped and our cars tore up", so I signed the card, but I never authorized anybody to file charges against the nursing home in my name. When I was called to come in an hour late, the employees met at a cafe near the nursing home, and we were told, "we are going to let Mrs. Johnston see what its like not to have any help". I liked my work at Fairview, and the only reason I didn't keep working was I was afraid to cross the picket line so I went along with the crowd and left with the others when some of the employees said "get the others out of the kitchen, we are going".

I remember when we went up at 3 o'clock, Mr. Robinson said for "anybody that wants to - go on in to work," but nobody said anything but they wanted their checks, and when they got their checks, they left.

Margaret Edna Barnett

Sworn to before me this 15th day of October, 1973.

Notary Public

STATE OF ALABAMA)
)
JEFFERSON COUNTY)

AFFIDAVIT

My name is Dale Warren, I am a Sargent of the Birmingham Police Department, and have been a Police Officer for eighteen years. I answered several calls to the Fairview Nursing Home during the spring of 1972, and was present when the employees received their pay-day from the Attorney Pat Robinson outside of the Nursing Home right after three p.m.

Mr. Robinson was identified to me as Mrs. Johnston's Attorney and I knew that she was the lady who ran the Nursing Home.

I guess there was about thirty or thirty-five people gathered in front at this time, I was outside in front of the door and Mr. Robinson was on the edge of the parking area in front of me, when the checks were ready in the Office they were brought out to Mr. Robinson. I remember Mr. Robinson asking the employees "to go back to work" at least twice while passing checks out to them and some he called by name and asked them personally when he handed them their check if they were going to come back on their regular shift, especially two who were supposed to work the late shift, and they were just mute, and wouldn't answer, and I never heard one of them say whether they would or wouldn't be back. I remember some of them complaining they weren't getting paid enough, that they had more days coming, and I remember Robinson telling them that he would check their records and if they had more days coming he would see that they got paid for them. After they got their checks they left the Nursing Home area, and some went back to the picket line in front. Answering one of the calls to the nursing home, several people were standing in the door-ways and hall talking, and Mrs. Johnston and one of the nurses were in the office sitting, when we arrived Mrs. Johnston complained about these people blocking the halls and disturbing the patients. Mrs. Johnston came out of the office with the nurse

and she asked them to leave, because they were disturbing the patients. They just stood there, so I told them they could not block exits or halls, and suggested they leave and let it be handled through legal channels, and they left.

_____

Sargent Dale Warren

Sworn to, before, this 17th day of July, 1973.

_____

Notary Public

EXAMINATION OF MABEL BLACK
(Attachment to Motion to Remand)

Q. All right, did you talk to Mrs. Johnson or her son or any of the managerial people?

A. I talked to Mr. Robinson is all I talked to on the outside.

Q. Was anything significant said between you and Mr. Robinson?

A. I asked him for my two days. I had two more days coming and he said that they would have to .... we would have to give him time to make out the checks.

Q. All right, you asked him for your final check in other words?

A. Yes, sir.

Q. Does that complete your testimony?

A. Yes, sir.

Q. Does the employer have any questions?

EMP. No, sir.

Conclusion of Mabel Black's testimony . . .

This Petition considered, Petitioner Prays that Certiorari will be granted, the Judgement will be vacated and this case will be Remanded to the Court of Appeals with instructions to the National Labor Relations Board for such further proceedings as may be appropriate in light of Burns International Security Services, Inc. V. N. L. R. B. 406 U.S. 272, 92 S. Ct. 1571, 32 L. Ed. 2d 61, and as provided in 29 U. S. C. s 160 (e).
s

S. Patrick Robinson

S. PATRICK ROBINSON
Attorney for Petitioner

CERTIFICATE OF PETITIONER'S ATTORNEY

The Attorney for Petitioner herewith certifies that the foregoing Petition is submitted in good faith, and not for delay, and assigns grounds in support of its Petition not previously presented in the original Petition for Certiorari.

S. Patrick Robinson

S. Patrick Robinson
Attorney for Petitioner

Certificate of Service

The undersigned Attorney for Petitioner, herewith certifies that he has served three copies of the Foregoing Petition For Re-Hearing on the Solicitor General of the United States by Special delivery air mail to Solicitor General Department of Justice Washington, D.C. 20530 this 6th day of November, 1974.

S. Patrick Robinson

S. Patrick Robinson
Attorney for Petitioner